Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1242

PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General
of Alabama

KENT BRUNSON
Assistant Attorney General
of Alabama

Attorneys for Respondent
250 Administrative Building
Montgomery, Alabama 36104

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OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

The question presented for review is adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT

This case arose out of the arrest and subsequent indictment by the Madison County, Alabama, Grand Jury of Paul Warren Bates on a charge of buying, receiving, concealing, or aiding in concealing a stolen money order machine. The Petitioner entered a plea of not guilty and the case was tried before a jury in the Madison County, Alabama, Circuit Court, which found the Petitioner guilty on January 6, 1972. The Petitioner was sentenced to be imprisoned in the State Penitentiary for a period of eight years as punishment for his crime.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered on September 28, 1973. Petitioner filed an Application for Rehearing which was denied, without opinion, by the Court of Criminal Appeals of Alabama on October 16, 1973. Petitioner then filed a Petition for Writ of Certiorari which was denied, without opinion, by the Supreme Court of Alabama on November 15, 1973.

The relevant facts are not in dispute. On April 27, 1971, Detective Bragg of the Huntsville Police Department investigated a burglary at Roy's Grocery. He went to the scene and was told by Mr. Campbell, the owner, that ninety cartons of cigarettes, a consumer Money Order Machine, and forty-four money orders were missing. The owner stated that taped to the machine was the name "Max Gray" and a telephone number. Detective Bragg saw one burglary sus-

pect, Joe Dean Bryant, sitting in a patrol car at the scene. That same night, after the burglary, Detective Bragg saw a small black English Ford in front of the B. & B. Cafe. The automobile was unoccupied at the time. He went to Judge Dave Archer on May 5, 1971, and applied for a warrant to search the cafe. Deputy Sheriff Bob Eddy accompanied him when the warrant was executed. In a room adjoining the cafe dining room, the money order machine was found in a cardboard box at the foot of a cot. Taped to the machine was the name "Max Gray" and the number 63.54.

The State introduced the search warrant and its supporting affidavit, which were identified by Detective Bragg. Appellant questioned the validity of the warrant and asked to take this witness on voir dire. The examination was conducted in the presence of the jury, without objection. Subsequently the Court overruled Appellant's objection that the affidavit was based on hearsay evidence.

ARGUMENT

The Petitioner's objection was as to the admissibility into evidence of the affidavit for the search warrant (State's Exhibit 1) and the search warrant (State's Exhibit 2).

The trial court correctly overruled the objection and the Alabama Court of Criminal Appeals affirmed, holding: "We say in the instant case there was sufficient basis for accepting the hearsay, and that the magistrate acted properly. Judge Archer did not need to be convinced that the money order machine was in the B. & B. Cafe, but only that it probably was."

The Alabama Court of Criminal Appeals based this

holding on *Jones v. U. S.*, 362 U. S. 257, 80 S. Ct. 725, which concluded that hearsay may be the basis for a warrant.

This Honorable Court has further held that a Magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by the reviewing court. *Spinelli v. U. S.*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584; *Jones v. U. S.*, supra.

The Alabama Court of Criminal Appeals held that the affidavit met the requirement set out in *Aquilar v. Texas*, 378, U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509. *Aquilar* held that although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the Magistrate must be informed of some of the underlying circumstances from which the informant concludes that contraband, such as narcotics, is where he claims it, and some of the underlying circumstances from which the officer concludes that the informant, whose identity need not be disclosed, is credible or his information reliable. *Aquilar v. Texas*, supra; *Rugendorf v. U. S.*, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825.

Since only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause for the issuance of a search warrant, there is no question that the warrant was properly issued in this case. *Spinelli v. U. S.*, 393 6. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584; *Beck v. Ohio*, 379 U. S. 89, 96, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223.

Further, a magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by the reviewing court. *Spinelli v. U. S.*, supra;

Jones v. U. S., supra. So, the trial court properly received them into evidence.

The question presented by this Petition is whether the trial court's giving to the jury for their consideration and scrutiny in the jury room an affidavit for a search warrant which was admitted into evidence over the objection of Petitioner, even though the affidavit contained grossly injurious hearsay testimony, deprived Petitioner of his right to be confronted by the witnesses against him guaranteed by the Sixth Amendment to the Constitution of the United States of America made applicable to the States by the Fourteenth Amendment.

The Petitioner finds it curious that at no point in the opinion or otherwise does the Court of Criminal Appeals or the Supreme Court of Alabama write to the question of the jury's access to the damaging hearsay evidence contained in the affidavit for the search warrant.

The answer is quite simple. Matters not objected to cannot be considered for the first time on appeal. *Haefer v. Snellgrove*, 288 Ala. 407, 261 So. 2d 431.

The record shows that after the trial court charged the jury he said:

> "Now, ladies and gentlemen, you will have the indictment in this case. You will have the affidavit and the search warrant and the return, which have been introduced in evidence. You will have the little card which has been introduced in evidence. You will also have, ladies and gentlemen, the forms of verdict which I have prepared and which you will have. After I have finished here, ladies and gentlemen, I am going to let you stay here to consider this case.

"Anything further from the State?

"MR. GREEN: Nothing further.

"THE COURT: Mr. King?

"MR. KING: No, sir."

It is clear then that there was no objection and the issue was not reserved for appeal.

The case was affirmed because the Alabama Court of Criminal Appeals and the Supreme Court of Alabama found no error in the trial court's rulings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General
of Alabama

KENT BRUNSON
Assistant Attorney General
of Alabama
ATTORNEYS FOR RESPONDENT

ADDRESS:
250 Administrative Building
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Kent Brunson, one of the attorneys for the Respondent, hereby certify that on this ——— day of ————, 1974, we did serve the requisite copies of the foregoing Brief and Argument in Opposition of Respondent on Honorable Charles King, by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record as follows:

Sullins and King
Attorneys at Law
206 Randolph Avenue, S. E.
Huntsville, Alabama 35801

JOSEPH G. L. MARSTON, III
Assistant Attorney General
of Alabama

KENT BRUNSON
Assistant Attorney General
of Alabama
OF COUNSEL